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In The
Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CENTER FOR ENERGY AND ECONOMIC DEVELOPMENT IN SUPPORT OF PETITIONER STATE OF ALASKA

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, The Center for Energy and Economic Development (CEED) submits this brief *Amicus Curiae* in support of Petitioner State of Alaska. Written consent to the filing of this brief has been granted by counsel for all parties, copies of which have been filed with the Clerk of the Court.[1]

Amicus, CEED, is a non-profit organization formed by the nation's coal-producing companies, railroads, a number of electric utilities, equipment manufacturers, and related organizations for the purpose of educating the public, including public-sector decision-makers, about the benefits of affordable, reliable, and environmentally compatible coal-fueled electricity. *Amicus* CEED members are engaged in socially valuable work. That is, they provide essential goods and services that improve and maintain the high quality of life enjoyed in this country.

As demonstrated herein, the implications of Petitioner's case far transcend its individual situation and create problems of nationwide magnitude. Moreover, *Amicus* believes that the ruling of the Ninth Circuit is inconsistent with a clearly-stated legislative act of Congress and is also at odds with the precedents of this Court that recognize the state-federal relationship under the federal Clean Air Act (CAA). Further, under the rule of the

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Ninth Circuit, tremendous uncertainty has been unnecessarily injected into the permitting process for new electrical generation facilities. *Amicus* believes that this uncertainty will unduly interfere with public and private efforts necessary for meeting the current and growing demand for such facilities.

OPINIONS BELOW, JURISDICTION, STATUTORY PROVISIONS INVOLVED AND STATEMENT OF THE CASE

Amicus CEED hereby adopts Petitioner's statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case. In addition, *Amicus* wishes to succinctly state the statutory scheme involved in this case and its relation to the State of Alaska. New Source Review (NSR) is the federal CAA permitting program that regulates the construction of major new stationary sources and major modifications to existing stationary sources. EPA's NSR regulations require such sources to perform health and visibility/air quality impact analyses, install stringent air pollution control equipment, and obtain permits for new construction at major stationary sources. NSR consists of more than one distinct subprogram: Prevention of Significant Deterioration (PSD) is for areas in attainment with health-based National Ambient Air Quality Standards (NAAQS); Non-attainment NSR (NNSR) is for those that are not in attainment with NAAQS.

The current PSD program is set forth in two sets of regulations. One set is 40 CFR § 52.21, which is part of the federal PSD program that applies as part of a federal implementation plan (FIP) for states that do not have an approved PSD program meeting the regulatory requirements of 40

CFR § 51.166 – the other set of regulations containing minimum standards for PSD provisions in State Implementation Plans (SIPs). In this and most cases, Alaska has an EPA approved PSD SIP program which delegates authority to the State of Alaska to perform health and visibility and air quality impact analyses, require installation of air pollution control equipment, and issue permits under the State administered PSD program.

Among the PSD requirements Congress imposed in the CAA is that the State require application of Best Available Control Technology (BACT) to any major modification at a major emitting facility subject to the PSD program. 42 U.S.C. § 7475(a)(4). The CAA mandates that BACT limits are to be determined on a case-by-case basis by the permitting authority. As Congress explained, in making this "key decision **[BACT]** . . . the *State* is to take into account energy, environmental, and economic impacts and other costs of the application of best available control technology. The weight assigned to such factors is to be determined by the ***State***." Sen. Rep. No. 127, 9th Cong., 1st Sess. 31 (1977) reprinted in 3 *1977 Legis. Hist.* at 1405 (emphasis added).[2]

[2] *See also 1977 Legis. Hist.* at 729 (emphasis added) ("One objection which has been raised to requiring the use of the best available control technology is that a technology demonstrated to be applicable in one area of the country is not applicable at a new facility in another area because of *difference[s] in feedstock material, plant configuration or other reasons*. For this and other reasons, *the committee voted to permit emission limits based on best available technology on a case-by-case judgment at the State level*. This flexibility should allow such differences to be accommodated and still maximize the use of improved technology.") (emphasis added).

SUMMARY OF ARGUMENT

The Ninth Circuit's decision, allowing EPA to usurp the authority that the federal CAA clearly delegates to the States, poses a grave threat to the ability of the States to make Best Available Control Technology (BACT) and other important discretionary decisions under the CAA. Under both the express statutory provisions involved in this case *and* the structure of the federal CAA, EPA's actions represent an invasion of the prerogatives left to the States in fashioning individual CAA "Prevention of Significant Deterioration" (PSD) permits. As such, the Ninth Circuit's decision upholding EPA's desire for "national consistency" is antithetical to the express statutory text and framework created by Congress.

Both the Clinton and Bush administrations have determined that more than 1,000 new electricity generation facilities are needed in this country in order to meet future demands. The problems presented by this case involve issues of national importance and call into question the ability of the States to make decisions entrusted to them by Congress to, among other things, ensure both clean air and adequate energy supplies for their citizens. This Court should reverse the Ninth Circuit's decision in order to resolve the conflict created by this ruling and to restore greater certainty to a process that is critical to balancing environmental protection with meeting the demand for additional future energy development.

REASONS FOR OVERTURNING THE NINTH CIRCUIT'S DECISION

I. THE NINTH CIRCUIT'S DECISION POSES A GRAVE THREAT TO THE ABILITY OF THE STATES TO ADDRESS A REAL AND GROWING NATIONAL ENERGY CRISIS

The Bush Administration has determined that, "Over the next ten years, demand for electric power is expected to increase by about 25 percent, and more than 200,000 megawatts of new capacity will be required." National Energy Policy, *Report of the National Energy Policy Development Group* (May 2001). These current and future energy and production needs will be local, regional, and national. Recognizing these needs, Congress gave the States "great flexibility" to achieve the goals of the CAA, *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 587 (5th Cir. 1981), including the ability to allow economic development (which, of course, includes power generation) within the tandem duty of preserving air quality in clean air areas. As the D.C. Circuit explained in *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), "[I]n the allocation of responsibilities made by Congress" with respect to preventing the significant deterioration of air quality, "maximum limitations have been set." *Id.* at 364. "These must be observed by the states, but assuming such compliance, growth-management decisions were left by Congress for resolution by the states." *Id.*

A State's authority to determine BACT for a particular source is "key" to its ability to "manage [its] allowed internal growth" under the CAA. *Id.* at 364. The "flexible approach" chosen by Congress "enables [a] State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting

facility, and such other considerations as *anticipated and desired economic growth for the area*." S. Rep. No. 95-127, at 31 (emphasis added). Congress' decision to make BACT "strictly a State and local decision," *id.*, makes sense, as it is the States – not the EPA – that are most sensitive to particular local needs and concerns. Further, that Congress required BACT to be determined on a "case-by-case," facility-specific basis, 42 U.S.C. § 7479(3), highlights the importance of such local considerations.

Amicus submits that the Ninth Circuit's decision, allowing EPA to dictate BACT to the States, would allow EPA to "assume control" of the States' "developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level consistent with" the limitations set out in the CAA. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 80 (1975). As such, the import of the Ninth Circuit's decision is plainly not what Congress intended. *See* S. Rep. No. 95-127, at 32 ("Nothing could be more detrimental to the intent of [the PSD] section and the integrity of [the] act than to have the process encumbered by bureaucratic delay.").

The Ninth Circuit's determination directly threatens the ability of the States to effectively and efficiently permit facilities that will provide the much needed power generation, in the next ten to twenty years.[3] By threatening the

[3] Contrary to EPA's actions in this case, the avowed intent of the Bush administration is to simplify the PSD permitting process and allow facilities to more quickly, reasonably, and efficiently make process changes that respond to marketplace needs and demands. EPA finalized NSR/PSD reforms on December 19, 2002, that are aimed at allowing "sources more flexibility to respond to rapidly changing markets and to plan for future investment in pollution control technologies." Available at

(Continued on following page)

States' ability to make BACT determinations, and other discretionary state determinations under the CAA, the bureaucratic delays sought to be avoided when authorizing the CAA will become inherent in energy project development. These bureaucratic delays will have an unnecessary chilling effect on public and private incentives needed for developing such projects – thereby delaying or prohibiting the resolution of critical energy deficiencies. Where, as here, EPA can override the decision of a State permitting authority at any time, even after the public comment period has closed, the permittee has no reason to believe that the permit issued by the state agency has any real meaning or allows construction of the permitted project. As such, the CAA's PSD permitting process will become an untenable obstacle to the states in their efforts to address current and growing energy demands.

II. THE NINTH CIRCUIT'S DECISION CREATES AN UNNECESSARY AND UNREASONABLE PERMITTING OBSTACLE FOR FUTURE ELECTRICAL GENERATION PROJECTS

In order to achieve the environmental protection and economic development goals of the CAA, the process of obtaining a PSD permit can be a very involved process and require the investment of substantial resources. Further, from a practical standpoint, *Amicus* members' experiences

http://www.epa.gov/air/nsr-review/. "The changes are intended to provide greater regulatory certainty, administrative flexibility, and permit streamlining, while ensuring the current level of environmental protection and benefit derived from the program and, in certain respects, resulting in greater environmental protection." *Id.*

in obtaining PSD permits, which are required to be obtained by an "applicant" pursuant to CAA § 165 before any construction of a project can begin, involve a minimum time period of 18 months and can often last as long as three years.

Amicus CEED members' experience is that the process of obtaining a PSD permit includes complex air impacts modeling, which typically requires specialized outside engineers and consultants to create. The permitting process also includes engineering calculation and estimation of emissions, review of the modeling results and impacts on ambient air quality, engineering studies and proposals from the permit applicant and equipment vendors (both production equipment and air control equipment), meetings with the permitting agencies' engineers and technical experts, and an extensive public notice and comment administrative process. As such, the CAA PSD process is expensive, time-consuming, and challenging.

Under the Ninth Circuit's decision, even after more than 18 months of planning, engineering, meeting, and discussing the proposed permit with the State regulatory agency and the public, the EPA may step in (as EPA did in this case by *not* participating in the State's administrative process) and demand a different result than that accepted by the State. The practical and logistical effect of EPA's late participation and delayed action would be to require the permittee to essentially start the process all over again. When a different type of control equipment is required than that originally proposed, engineered, studied, and modeled by a permit applicant, it is not merely a matter of changing a few words in a permit application. The permit applicant must instead essentially begin anew

with engineering and studying the control equipment demanded by EPA, run a new air quality impacts model, amend the permit and reopen the comment period, and negotiate finalization of the permit with the state permitting authority. Thus, the EPA actions endorsed by the Ninth Circuit have imposed numerous practical burdens that were neither accounted for nor considered by the Ninth Circuit.

As the Ninth Circuit has, itself, previously observed in a case concerning the licensing of a small electrical generation facility:

> The hardship is the process itself. Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there ever will be revenue. Meanwhile, politics, laws, interest rates, construction costs, and costs of alternatives change. Undue process may impose cost and uncertainty sufficient to thwart the federal determination that a power plant should proceed. As the Supreme Court explained in an analogous context, "to require the industry to proceed without knowing whether the state regulation is valid would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens of California." *Pacific Gas*, 461 U.S. at 201-202, 103 S.Ct. at 1721.

See Sayles Hydro Associates v. Maughan, 985 F.2d 451, 454 (9th Cir. 1993).

As recognized previously by the Ninth Circuit in the *Sayles* case and, more importantly, by this Court in *Pacific Gas*,[4] the addition of *undue* process, particularly when directly at odds with the process sanctioned by Congress, greatly hamstrings the ability to meet current and future energy demands. Such additional *undue* process would only confound the recent finding made by the Bush Administration:

> A fundamental imbalance between supply and demand defines our nation's energy crisis. . . . [i]f energy production increases at the same rate as during the last decade our projected energy needs will far outstrip expected levels of production.

See National Energy Policy, *Report of the National Energy Policy Development Group* (May 2001), p. viii.[5]

III. THE NINTH CIRCUIT'S DECISION USURPS THE ROLE CONGRESS GAVE TO THE STATES IN PERMITTING NEW ELECTRIC GENERATION FACILITIES UNDER THE CLEAN AIR ACT

Congress declared in the federal CAA that "Air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(3). Despite Congress' clear

[4] *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 201 (1983).

[5] Available at http://www.energy.gov/HQPress/releases01/maypr/energy_policy.htm.

emphasis on state primacy, the Ninth Circuit has held that "the EPA has the ultimate authority to decide whether [a] state has complied with the [Best Available Control Technology] BACT requirements of the Act." *Alaska DEC v. EPA*, 298 F.3d 814, 820 (9th Cir. 2002). *Amicus* submits that the Ninth Circuit's flawed decision merits prompt reversal because that Court failed to recognize that EPA's authority under the CAA is limited to acting when a State has failed to comply with requirements or prohibitions of the CAA and the requirements to make a BACT determination – a function much different than "ultimate review authority" over discretionary permitting determinations made by the State. *See* 42 U.S.C. § 7413 and § 7477.

Further, the Ninth Circuit's flawed decision stands in sharp conflict with decisions of this Court and the lower Courts concerning federal and state division of responsibilities under the CAA. For example, the Supreme Court, in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975), addressed whether states could use CAA § 110(a)(3) to seek revisions of State Implementation Plans (SIPs) for the purpose of easing limitations on a single pollution source. This Court held that a state could do that so long as the revised plan would enable the state to attain and maintain national ambient air quality standards (NAAQS). *See Train*, 421 U.S. at 78. In interpreting CAA § 110, this Court stated:

> [T]he Act gives *the agency [EPA] no authority to question the wisdom of a state's choices of emissions limitations* if they are part of a plan which satisfies the standards of Section 110(a)(2), and the agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan which satisfies those standards. Section 110(c). Thus, *so long as the ultimate effect*

> *of a state's choice of emission limitations is compliance* with the national standards for ambient air, *the state is at liberty to adopt whatever mix* of emission limitations *it deems best suited* to its particular situation.

Train, *supra*, 421 U.S. at 79 (emphasis added).

Similarly, in recognition of the primacy of the states' role under the CAA, the Circuit Courts have rebuffed efforts by EPA to mandate specific emission limitations in SIPs. In *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), the D.C. Circuit specifically determined that EPA lacked the authority under CAA § 110 to condition approval of a SIP on the state's adoption of a particular control measure. Further, in *Bethlehem v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1977), the Seventh Circuit rejected an EPA effort to only partially approve a SIP, thereby rendering the state plan more stringent than the state intended, stating:

> [T]he Clean Air Act creates a partnership between the states and the federal government. The state proposes, though the EPA disposes. The federal government, through the EPA, determines the ends – the standards of air quality – but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through the state implementation plans and timetables of compliance. . . . The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states, . . . especially when, as in this case, the agency is overriding state policy.

The federal Courts of Appeals have consistently endorsed the statutory requirement that BACT be determined through a flexible balancing process by the permitting

authority. The U.S. Court of Appeals for the District of Columbia Circuit has pointed out, for example, that "BACT is defined, in general, as a level of control technology appropriate to the facts and *circumstances of the particular applicant.*" *Alabama Power v. Costle*, 606 F.2d 1068, 1085 (D.C. Cir. 1979) (emphasis added). Previously, the U.S. Court of Appeals for the Ninth Circuit observed that "the BACT determination is . . . *source specific.*" *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1359 (9th Cir. 1981) (emphasis added). Further, the Ninth Circuit also previously correctly concluded that, while a particular control technology may be BACT for one plant, the permitting authority "might decide that for [another] . . . facility . . . [that technology is] inappropriate for economic *or* energy *or* environmental reasons." *Id.* (emphasis added). *See also*, *Sur Contra La Contaminacion v. EPA*, *et al.*, 202 F.3d 443, 447 (1st Cir. 2000). Unlike the present decision of the Ninth Circuit, other court decisions confirm what the language of the CAA makes plain: a BACT determination must be made on a case-by-case basis by the State after taking into account energy, environmental, and economic impacts and other costs. Uniformity is not mandated by the BACT provisions; flexibility is.

Despite EPA's objections to the contrary, Alaska did all that was required and more by reviewing the Red Dog Mine application and emission reduction proposals in accordance with the statutory requirements. Alaska's determination was based on a reasoned review of the environmental and economic impacts and consideration of all of the CAA § 165 statutory BACT factors. Ironically, the BACT determination made by Alaska also had a greater

net environmental and human health benefit than that required by EPA.

IV. THE NINTH CIRCUIT'S FLAWED DECISION RESTS ON NON-BINDING FEDERAL POLICY DIRECTIVES THAT UNLAWFULLY CONSTRAIN CLEAR STATE AUTHORITY

While the Ninth Circuit expressly upheld EPA's order vetoing the Alaska-issued PSD permit, *Amicus* wishes to underscore that this case also demonstrates how state authority and discretion in the permitting of new facilities is subject to increasing erosion. State authority is being usurped by the alarming trend of EPA and the federal land management agencies (*e.g.,* National Park Service, U.S. Forest Service) using "guidance documents" that seek those agencies' roles in the CAA permitting process at the expense of the states.

The Ninth Circuit correctly observed that Alaska was not bound by EPA guidance documents that have not been subjected to full public notice and comment under the Administrative Procedure Act. Nonetheless, the Ninth Circuit justified its decision to uphold EPA's Orders based on *its* determination that the low NOx control technology selected was not appropriate under EPA's more than ten-year old "draft" guidance document setting forth the "top-down BACT approach." *Alaska DEC v. EPA*, at 10. However, nowhere in the CAA and implementing regulations is there any reference to the "most stringent technology" or the "top-down BACT" approach that the Ninth Circuit relied on in upholding the EPA orders. Notably, the Ninth Circuit did not (and could not) cite any statute, regulation, or case law that imposes a legal obligation on an applicant or permitting authority that *requires* the "top down"

approach for interpreting and/or applying the statutory BACT factors.[6]

Contrary to the Ninth Circuit's decision, nowhere in the CAA is there any suggestion that certain of the BACT criteria – energy, environmental, and economic impacts and other costs – should be emphasized over others. Further, nowhere in the CAA or implementing regulations is there any indication that BACT limits must be the lowest emission limits that are technically and economically feasible (or technically and economically infeasible, as in this case) for a similar source or source category. Indeed, such an interpretation of the CAA would essentially make BACT limits equivalent to the statutorily *distinct* "lowest achievable emission rate" limits which Congress has imposed *only* on new or modified sources locating in nonattainment areas. *See* 42 U.S.C. § 7501(3). Further, nowhere in the CAA or Alaska SIP is there any

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[6] While the Ninth Circuit erroneously relied upon EPA's draft 1990 NSR Manual, the Court should have instead recognized that an agency policy or guidance, unlike a rule, "does not seek to impose, elaborate or interpret a legal norm" and cannot bind an agency (or the State in this case) to a "particular legal policy position." *See Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997). *United States Tel. Ass'n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994). The Ninth Circuit's decision is thus inconsistent with federal jurisprudence recognizing that when agencies apply guidance in a direct and substantive fashion, federal courts have uniformly set those administrative actions aside and required federal agencies to comply with the notice and comment requirements of § 553 of the federal Administrative Procedure Act (APA). *See Paralyzed Veterans of America v. D. C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 987, 100 (1995). *See also, Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Caruso v. Blockbuster-Sony Music Entertainment Center*, 174 F.3d 166, 176-178 (3d Cir. 1999).

presumption that some technology is BACT simply because it has been determined to be BACT for a given type of emission source in another location or for another industry. Congress recognized that the balancing test is mandatory simply because site-specific considerations will warrant emphasis on different considerations. *1977 Legis. Hist.*, at 729.

The State of Alaska was required to and did "transmit to the Administrator [EPA] a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to consideration of such permit." *See* 42 U.S.C. § 7475(d). The Ninth Circuit stated that "In July 1999, the EPA entered the discussion over Cominco's application at the urging of the National Parks Service, which had expressed concern that the 'nitrogen oxide emissions . . . *could* affect vegetation at Cape Krusenstern National Monument and Noatak National Preserve.'" *Alaska DEC*, at 817. Notably, the speculative comments from the National Park Service (NPS), and the EPA subsequent involvement in the permitting action, came *after* the close of the public comment period on the proposed permit for the Red Dog Mine.

Under the CAA, FLMs are required to protect the air quality related values of any lands within a *Class I* area and to consider whether a major emitting facility will have an adverse impact on such values. *See* 42 U.S.C. § 7475(d)(2)(B). However, the CAA neither mandates nor carves out a role for FLMs in Class II areas. The Cape Krusenstern National Monument and the Noatak National Preserve are not mandatory Class I areas and have not been designated Class I areas under the review and recommendation authority of the NPS. Despite EPA and

the NPS's late entry into the State of Alaska's administrative process, the Ninth Circuit gave full credence to the administrative alternatives of EPA and the NPS based upon purported authority contained in agency guidance documents but *not* regulatory provisions.

CONCLUSION

Amicus submits that the Ninth Circuit's opinion is bad law, is injurious to the present and future public welfare, has no place in federal jurisprudence, and should be set aside.

Respectfully submitted,

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